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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION**

JOHN A. DOUGLAS, Individually, as  
Trustee of the Lauren L. Douglas Trust,  
and On Behalf of All Others Similarly  
Situated.

v.  
Plaintiff,

HENRIK FISKER, et al.

### Defendants.

Case No. 2:23-cv-09976-FLA (KSx)

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANTS' MOTION TO  
DISMISS AMENDED COMPLAINT**

Date: March 14, 2025

Time: 1:30 p.m.

Judge: Hon. Fernando L. Aenlle-Rocha  
Ctrm: 6B

Date Action Filed: November 27, 2023

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1      **I. INTRODUCTION**

2      Fisker Inc. (“Fisker” or the “Company”) is an American automotive  
3 company that designed, developed, and sold electric vehicles, including the Fisker  
4 Ocean®, an all-electric SUV designed to be the world’s most sustainable vehicle.  
5 Unfortunately, Fisker was impacted by industry-wide macroeconomic events and  
6 significant liquidity challenges, and ultimately filed for bankruptcy protection in  
7 June 2024. Plaintiff, a one-time Fisker shareholder, tries to recoup his purported  
8 investment losses through the amended complaint (“AC”), which claims that two  
9 former Fisker executives made fraudulent misstatements in connection with the  
10 Company’s financial disclosures in the second and third quarters of 2023.  
11 Specifically, Plaintiff argues that on August 4, 2023, Fisker management  
12 incorrectly predicted that the Company’s 2023 gross margin would be positive, and  
13 that on November 13, 2023, Fisker’s preliminary earnings results miscategorized  
14 \$20 million in expenses as “selling, general and administrative expenses” rather  
15 than “cost of goods sold.” When Fisker later disclosed that its third quarter 2023  
16 (“3Q23”) gross margin was negative and that certain of its expenses had been  
17 recategorized, investor-plaintiffs pounced, claiming that Defendants’ earlier  
18 statements must have been fraudulent.

19      The AC runs into multiple well-established principles of securities law, each  
20 of which independently mandates dismissal.

21      ***The allegedly false statements are not actionable.*** None of the challenged  
22 statements supports a securities fraud claim. The allegations concerning Fisker’s  
23 August 4 disclosures are a classic example of “fraud-by-hindsight” pleading.  
24 Plaintiff simply assumes that because Fisker announced a negative third quarter  
25 gross margin in November 2023 as a result of an accounting adjustment,  
26 Defendants *must have known* back in August that the Company’s comparatively  
27 optimistic full-year forecast was wrong. Yet Plaintiff never alleges specific  
28 contemporaneous *facts* showing that the need for this accounting adjustment was

1 already apparent in August. This conclusory, fact-free pleading style violates the  
2 heightened pleading standards of the Private Securities Litigation Reform Act (the  
3 “PSLRA”). Moreover, the November 13 statements are inactionable because they  
4 were made *two months after* Plaintiff’s last purchase of Fisker stock, and only those  
5 statements made “before investors purchase the securities” are “actionable under  
6 Rule 10b-5[.]” *Binder v. Gillespie*, 184 F.3d 1059, 1066 (9th Cir. 1999).

7 There are still more problems with Plaintiff’s theory of falsity. Some of the  
8 challenged statements are indisputably accurate statements concerning Fisker’s  
9 historical financial results, which are inactionable as a matter of law. Others  
10 constitute “forward-looking statements” concerning Fisker’s future performance,  
11 and therefore are protected by the PSLRA’s “safe harbor.” Others are inactionable  
12 expressions of opinion or belief. Still others are merely vague or generalized  
13 assertions of corporate optimism (or “puffery”), which are insufficient to support a  
14 fraud claim because no reasonable investor could rely on them. In sum, all of the  
15 challenged statements are inactionable, and most on multiple, independent grounds.

16 ***Plaintiff does not adequately allege an intent to defraud.*** As a threshold  
17 matter, Plaintiff’s narrative of fraud is completely implausible, which alone is  
18 dispositive. The AC lacks any of the traditional hallmarks of scienter—such as  
19 insider stock sales during the class period—and fails to articulate any logical reason  
20 why Defendants would lie about Fisker’s financials in August only to come clean in  
21 November, without ever attempting to profit from their fraud. Additionally, while  
22 Plaintiff runs through a series of “scienter allegations,” none supports the premise  
23 that Defendants knew or had access to any facts inconsistent with their public  
24 statements. For example, the AC purports to quote two anonymous “former  
25 employee” witnesses, but neither witness had any knowledge of, or insight into,  
26 what Defendants knew and when. Taken individually or collectively, Plaintiff’s  
27 allegations fall well short of establishing the “strong inference” of scienter required  
28 by the PSLRA.

1        ***Plaintiff does not adequately allege loss causation.*** Plaintiff claims that he  
2 was injured when his “artificially inflated” Fisker stock declined in value following  
3 three partially “corrective disclosures” (on November 8, 13 and 20), which he says  
4 revealed “the truth” concerning Defendants’ supposed misrepresentations. But two  
5 of those disclosures were made *after* Plaintiff sold all his Fisker stock, and thus  
6 could not possibly have contributed to his “losses.” And the remaining disclosure  
7 (a press release regarding a delayed 10-Q filing) was not “corrective” in that it did  
8 not reveal any “truth” about any challenged statement.

9            For these reasons and as further shown below, the AC should be dismissed.

10 **II. BACKGROUND**

11        **A. Fisker Inc.**

12        Fisker is an electric vehicle company focused on developing the “most  
13 sustainable” vehicles in the world. AC ¶ 2. The Company was launched in 2016  
14 by its two co-founders, legendary car designer and automotive entrepreneur, Henrik  
15 Fisker (“Mr. Fisker”), and Dr. Geeta Gupta-Fisker (“Dr. Gupta-Fisker”). *Id.* ¶¶ 1–  
16 2. Mr. Fisker served as CEO and board chairman, while Dr. Gupta-Fisker served as  
17 CFO and COO, as well as a director. *Id.* ¶¶ 29–30. The Company went public in  
18 2020, and its shares were traded on the New York Stock Exchange until late March  
19 2024 (it was delisted shortly thereafter in April 2024). *Id.* ¶¶ 33, 88. On June 19,  
20 2024, Fisker filed for bankruptcy protection. *Id.* ¶ 1 n.2.

21        While the Company designed several ground-breaking vehicles, its only  
22 model to reach market was the award-winning Fisker Ocean, an all-electric SUV  
23 that has the longest battery range of any electric vehicle in its class. *Id.* ¶¶ 2, 34–  
24 36. In connection with its development of the Ocean, Fisker pursued a  
25 “technology-enabled, asset-light” business model that relied in part on outsourcing  
26 vehicle production and other services to Magna Steyr—a leading contract  
27 manufacturer—in order to reduce development cost and time to market. *Id.*

1           **B. Fisker Projects Positive Gross Margin In 2023.**

2           On August 4, 2023, Fisker issued a press release and filed a Form 8-K  
3 disclosing that the Company was “already making a positive profit margin on [its]  
4 first vehicles,” a margin of 7.5% in the second quarter. AC ¶¶ 111–14; *see* Ex. 1 at  
5 6.<sup>1</sup> Fisker also announced that it “anticipate[d] an 8–12% gross margin range for  
6 full year 2023, provided input costs do not change dramatically.” AC ¶¶ 111–14;  
7 *see* Ex. 1 at 9. Fisker cautioned investors that its projection of gross margin  
8 “involve[d] risks and uncertainties,” including that its “supply partners [might] not  
9 meet agreed upon timelines or experience capacity constraints,” which “could cause  
10 actual results to differ materially from the forward-looking statements contained” in  
11 the press release. Ex. 1 at 10. The Company also disclosed that 1,022 Oceans were  
12 produced in the second quarter. AC ¶ 51; Ex. 1 at 6.

13           The same day, Fisker held an earnings call to discuss its financial results,  
14 which included commentary concerning the Company’s gross margin forecast. *Id.*  
15 ¶¶ 111–19. As with the press release, Fisker management expressly cautioned  
16 during the call that “[a]ctual results . . . are subject to risks and uncertainties that  
17 could cause our results to differ materially from those projected.” Ex. 2 at 19.

18           **C. Fisker Experiences Executive Turnover And Delays 10-Q Filing.**

19           On September 22, 2023, the Company reported in a Form 8-K filed with the  
20 SEC that, on September 19, 2023, its chief accounting officer (“CAO”), John  
21 Finnucan, had given notice of his resignation from Fisker to “become the chief  
22 financial officer of a private company that is focused on refueling solutions.” AC  
23 ¶ 64; Ex. 3 at 39. The press release noted that “Mr. Finnucan’s departure [was] not  
24 related to the operations, policies, or practices of the Company,” and that he would  
25 “remain an employee of the Company through at least October 27, 2023” in order  
26 to “facilitate an orderly transition[.]” AC ¶ 64; Ex. 3 at 39.

27           

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<sup>1</sup> All “Ex. \_\_\_” references are to the exhibits attached to Defendants’ Request for  
28 Judicial Notice.

1           The Company hired Florus Beuting to take over as CAO effective November  
2 6, 2023. AC ¶ 77. As a result of the CAO transition, Fisker announced on  
3 November 8, 2023 that it needed to briefly delay both the release of its third quarter  
4 results and the filing of the 10-Q. *See id.* ¶¶ 63, 67.

5           **D. Fisker Announces Third Quarter Results.**

6           On November 13, 2023, Fisker released the Company’s third quarter  
7 preliminary financial results, advising, among other things, that the Company’s  
8 third quarter gross margin was negative on a GAAP basis. AC ¶¶ 66, 120.  
9 Specifically, Fisker disclosed that its third quarter: (i) “gross margin was -17%” on  
10 a GAAP basis, (ii) “adjusted gross margin was 9%, which exclude[d] an inventory  
11 valuation adjustment associated with lower levels of production during the ramp-up  
12 phase which [Fisker] expect[ed] to continue until [it] reach[ed] full production,”  
13 (iii) “cost of goods sold” was \$83.92 million, and (iv) “net loss totaled \$91  
14 million.” AC ¶¶ 66, 120–23. The press release specifically warned that “[t]he  
15 financial results discussed herein are presented on a preliminary basis” and that  
16 “final data will be included in Fisker’s Quarterly Report on Form 10-Q.” Ex. 4  
17 at 51. During Fisker’s earnings call later that day, Dr. Gupta-Fisker referred to the  
18 quarter as “highly complex,” noting that during the quarter the Company “went  
19 from \$800,000 of revenue to \$71 million of revenue” in “multiple countries,”  
20 further explaining that Fisker was experiencing “growing pains” that management  
21 was working “tirelessly” to address. AC ¶¶ 69, 126; Ex. 5 at 68. The Company  
22 also disclosed that “[i]n the course of completing the preparation of the [10-Q], the  
23 Company determined that it has material weaknesses in the Company’s internal  
24 control over financial reporting,” which would be further discussed in the  
25 forthcoming 10-Q. AC ¶ 67.

26           **E. Post-Class Period Disclosures.**

27           On November 20, 2023, Fisker announced that Mr. Beuting, the Company’s  
28 CAO, had tendered his resignation. AC ¶ 77.

1           Fisker filed its 10-Q on November 22, 2023, disclosing, among other things,  
2 that “approximately \$20 million of expenses” had been “incorrectly recorded  
3 primarily as selling, general and administrative expenses in our preliminary  
4 earnings results, but were later determined to be associated with production set-up  
5 activities and are now appropriately reflected in cost of revenues.” *Id.* ¶ 79.

6           **III. THE RIGOROUS PLEADING STANDARDS GOVERNING THIS**  
7           **MOTION**

8           To survive a Rule 12(b)(6) motion to dismiss, “a complaint must contain  
9 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible  
10 on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court need not  
11 accept as true “allegations that are merely conclusory, unwarranted deductions of  
12 fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049,  
13 1055 (9th Cir. 2008). Rather, Plaintiff must allege “enough facts to state a claim to  
14 relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570  
15 (2007).

16           Rule 9(b) and the PSLRA impose additional, exacting pleading requirements  
17 in securities fraud cases. “Rule 9(b) requires particularized allegations of the  
18 circumstances constituting fraud, including identifying the statements at issue and  
19 setting forth what is false or misleading [] about the statement[s] and why the  
20 statements were false or misleading at the time they were made.” *In re Rigel*  
21 *Pharms., Inc. Sec. Litig.*, 697 F.3d 869, 876 (9th Cir. 2012). The PSLRA similarly  
22 requires a complaint to specify each statement alleged to have been misleading and  
23 the reasons why it was misleading when made, and to “state with particularity all  
24 facts on which that belief is formed.” 15 U.S.C. § 78u-4(b)(1). The PSLRA further  
25 requires a complaint to “state with particularity facts giving rise to a strong  
26 inference that [each] defendant acted with” scienter. 15 U.S.C. § 78u-4(b)(2). A  
27 “strong inference” of scienter must be “more than merely plausible or reasonable—  
28 it must be cogent and at least as compelling as any opposing inference of

1 nonfraudulent intent.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308,  
2 314 (2007).

3 **IV. ARGUMENT**

4 **A. The AC Fails to Allege An Actionable Misstatement.**

5 **1. Statements 7–12<sup>2</sup>: Statements Made *After* Plaintiff’s Last  
6 Stock Purchase**

7 Plaintiff last purchased Fisker stock in September 2023. See ECF No. 26-2  
8 (Plaintiff’s PSLRA Certification). But half of the challenged statements were made  
9 nearly two months *later*—on November 13, 2023. The claims based on these  
10 November 2023 statements are actionable as a matter of law. A cause of action  
11 under Section 10(b) “applies only to misrepresentations or omissions made ‘in  
12 connection with the purchase or sale of any security.’” *Binder*, 184 F.3d at 1066  
13 (quoting 15 U.S.C. § 78k(b)). “Statements issued after a plaintiff’s purchase of  
14 stock” do not satisfy this requirement as they “could not have affected the  
15 plaintiff’s decision to purchase stock.” *Kelly v. Elec. Arts, Inc.*, 71 F. Supp. 3d  
16 1061, 1069 (N.D. Cal. 2014) (citing *Hanon v. Dataproducts Corp.*, 976 F.2d 497,  
17 501 (9th Cir. 1992)). “[C]onduct actionable under Rule 10b-5 must occur *before*  
18 investors purchase the securities.” *Binder*, 184 F.3d at 1066 (emphasis added).  
19 Here, Plaintiff does not allege that he purchased Fisker stock after November 13,  
20 2023. Accordingly, the alleged misstatements made on November 13, 2023 are  
21 “inactionable as a matter of law because they post-date lead plaintiff[’]s purchase of  
22 stock.” *Kelly*, 71 F. Supp. 3d at 1069; *Wanca v. Super Micro Comput., Inc.*, 2018  
23 WL 3145649, at \*7 (N.D. Cal. June 27, 2018) (dismissing claim based on  
24 statements made after plaintiffs’ stock purchase).

25  
26 \_\_\_\_\_  
27 <sup>2</sup> For the Court’s convenience, attached as Appendix A is a chart identifying each of  
28 the challenged statements raised in the AC. As used in this brief, “Statement 1”  
refers to the statement identified in the row numbered “1” in Appendix A, and so  
on.

1           **2.       Statements 1–6: August 4, 2023 Statements About Gross**  
2       Margin

3           According to Plaintiff, Defendants' August 4, 2023 statements were  
4 misleading because they failed to disclose that Fisker's gross margin was "being  
5 adversely impacted by excess fixed production overhead costs that could not be  
6 fully allocated to inventory due to lower levels of production during Fisker's ramp-  
7 up in production[.]" AC ¶¶ 115, 117, 119. But Plaintiff alleges no specific *facts*  
8 suggesting that Fisker's gross margin was being adversely impacted as of August 4,  
9 2023. Instead, Plaintiff relies on a fraud-by-hindsight theory, merely *assuming* that  
10 because Fisker made an inventory valuation adjustment when reporting its *Q3*  
11 results three months later, there must have been an overhead cost issue necessitating  
12 an accounting adjustment when the Company reported its *Q2* results on August 4,  
13 2023. *See* AC ¶ 101. This failure to back up allegations of falsity with  
14 particularized, contemporaneous facts is fatal to Plaintiff's claim. Plaintiff must  
15 plead that the challenged statements were untrue or misleading when made.  
16 *Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999); *Lowe v. Tandem*  
17 *Diabetes Care Inc.*, 2024 WL 1898473, at \*10 (S.D. Cal. Apr. 30, 2024). "It is  
18 clearly insufficient for plaintiffs to say that a later, sobering revelation makes an  
19 earlier, cheerier statement a falsehood." *M & M Hart Living Tr. v. Glob. Eagle*  
20 *Ent., Inc.*, 2017 WL 5635424, at \*7 (C.D. Cal. Aug. 20, 2017) (internal citation  
21 omitted).

22           Relatedly, Plaintiff does not adequately plead that Defendants had a duty to  
23 disclose information that was not in their hands in August 2023. A duty to disclose  
24 material information to investors can exist only when the party in question actually  
25 "has [the] information that" investors are "entitled to know." *Chiarella v. United*  
26 *States*, 445 U.S. 222, 228 (1980). Here, Plaintiff alleges that Fisker reported an  
27 "\$18.2 million inventory valuation adjustment" on November 13 that had a  
28 "significant impact on the Company's reported gross margins." AC ¶ 101. But

1 Plaintiff does not plead specific facts showing that Defendants had this information  
2 on August 4, 2023. The bare assertion that Defendants “were aware that 3Q23  
3 gross margins would be adversely impacted,” AC ¶ 101, does not pass muster. *See,*  
4 *e.g., Lowe*, 2024 WL 1898473, at \*10 (complaint dismissed where plaintiff alleged  
5 “no contemporaneous facts” to “show that the challenged statements were  
6 materially false or misleading **when made**”) (emphasis added).

7           **3. Statements 1, 3, and 6: Accurate Statements of Historical**  
8           **Results**

9           Several of the challenged statements made on August 4, 2023 concern  
10 Fisker’s historical performance—specifically, Fisker’s gross margin for the already-  
11 concluded second quarter. *See* Statements 1 (“we are already making a positive  
12 profit margin on the first vehicles we are selling”) (AC ¶ 111; Ex. 1 at 6) and 3  
13 (“talking about profitability, I don’t know of any EV start-up that ever made a  
14 double-digit profit margin on the very first cars that we have delivered”) (AC ¶ 113,  
15 Ex. 2 at 19). Portions of Statement 6 are also historical, as Mr. Fisker noted he was  
16 “really excited about [Fisker’s] positive gross margins . . . because normally in an  
17 EV start-up, you are . . . running 2 or 3 years with massive losses, which obviously  
18 means you need to raise a lot of money just to cover those losses” and Fisker was  
19 “not in that position.” AC ¶ 118; Ex. 2 at 35.

20           The AC does not allege with particularity that these historical statements  
21 relating to Fisker’s gross margin in Q2 were inaccurate when made. Though the  
22 AC focuses heavily on the later disclosure of the inventory valuation adjustment  
23 implemented in connection with the announcement of gross margin numbers for *Q3*  
24 (*see* AC ¶¶ 18, 79), there is no particularized allegation that the gross margin  
25 numbers for Q2 were erroneous. Indeed, the Q2 gross margin numbers were never  
26 restated. Accurate statements of historical performance like these are not  
27 actionable as a matter of law because they “contain no implicit prediction that those  
28 events or conditions will continue in the future.” *In re Caere Corp. Sec. Litig.*, 837

1 F. Supp. 1054, 1058 (N.D. Cal. 1993) (internal citations omitted).

2           **4. Statements 2 and 4: Forward-Looking Statements Protected**  
3           **by the PSLRA Safe Harbor**

4 The AC also challenges certain forward-looking statements<sup>3</sup>:

- 5           • “Fisker anticipates an 8-12% gross margin range for full year  
6           2023, provided input costs do not change dramatically,” AC ¶ 112  
7           (Statement 2); and  
8           • “We still anticipate gross margins for the full year 2023 in the 8%  
9           to 12% range . . . provided input costs do not change dramatically,”  
AC ¶ 114 (Statement 4).

10 These statements are protected by the PSLRA safe harbor, and are thus inactionable  
11 as a matter of law, because (1) they were identified as forward-looking statements;  
12 (2) they were accompanied by adequate cautionary language; and (3) even if they  
13 lacked such cautionary language (they do not), the AC is devoid of facts—specific  
14 or otherwise—to suggest that Defendants had actual knowledge that the statements  
15 were false when made. 15 U.S.C. § 78u-5(c)(1)(A)(i).

16           *First*, these statements were identified as forward-looking. Ex. 1 at 10 (“This  
17 press release includes forward-looking statements, which are subject to the ‘safe  
18 harbor’ provisions of the [PSLRA].”); Ex. 2 at 19 (“Please note that today’s  
19 discussion includes forward-looking statements about our expectations.”).

20           *Second*, these statements were accompanied by language cautioning that  
21 “such forward-looking statements are not guarantees of future performance and are  
22 subject to risks and uncertainties.” Ex. 1 at 10 (Statement 2); Ex. 2 at 19  
23 (Statement 4). The press release and relevant investor calls also directed listeners  
24  
25

26           

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<sup>3</sup> A forward-looking statement is any statement regarding (1) financial projections,  
27 (2) plans and objectives of management for future operations, (3) future economic  
28 performance, or (4) the assumptions underlying or related to any of these issues.  
15 U.S.C. § 78u-5(i)(1).

1 to the more detailed risk factors outlined in Fisker’s SEC filings.<sup>4</sup> These materials  
2 specifically warned of the risks Plaintiff asserts later came to pass, including that  
3 Fisker’s “forecast reli[e]d” in large part upon assumptions and analyses developed  
4 by [Fisker],” and “[i]f these assumptions or analyses prove[d] to be incorrect, [its]  
5 actual operating results may be materially different from [its] forecasted results.”  
6 Ex. 6 at 76.

7 **Finally**, even if these statements were not accompanied by cautionary  
8 language (they are), none of them would be actionable because the AC does not  
9 allege specific facts showing Defendants’ actual knowledge that any forward-  
10 looking statement was false when made. *See* 15 U.S.C. § 78u-5(c)(1)(B).  
11 Conclusory allegations that Defendants knew the statements were false based on  
12 “their positions and access to material non-public information available to them”  
13 (AC ¶ 32) are not enough. *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1112 (9th Cir.  
14 2010) (dismissing claims based on forward-looking statements supported only by  
15 “conclusory allegations” of knowledge); *see also infra* § IV(B).

16 **5. Statements 1, 3–6, and 11: Puffery**

17 Plaintiff also challenges numerous statements of corporate optimism, or  
18 “puffery,” which are not actionable because they employ terms “not capable of  
19 objective verification and lack a standard against which a reasonable investor could  
20 expect them to be pegged.” *In re Impac Mortg. Holdings, Inc. Sec. Litig.*, 554 F.  
21 Supp. 2d 1083, 1096 (C.D. Cal. 2008) (cleaned up).

22 For example, the alleged misrepresentations include various optimistic  
23 statements about Fisker’s future:

- 24 • “We are currently in a quarter that truly marks the inflection for  
25 Fisker,” AC ¶ 111 (Statement 1);

26 \_\_\_\_\_  
27 <sup>4</sup> See Ex. 1 at 10; Ex. 2 at 19 (referring to press release and Fisker’s “filings with  
28 the [SEC]”); Ex. 5 at 56 (referring to press release and Fisker’s “filings with the  
[SEC].”).

- 1     • “I think that really sets the stage for where we’re going in the  
2         future,” *id.* ¶ 113 (Statement 3);  
3     • “I’m also really excited about our positive gross margins,” *id.*  
4         ¶ 118 (Statement 6); and  
5     • “The positive adjusted gross margin demonstrates the benefit of  
6         our unique vehicle capabilities within the company and points  
7         towards a faster path towards positive EBITDA,” *id.* ¶ 124  
8         (Statement 11).

9     These are the types of generalized expressions of optimism that courts routinely  
10    dismiss at the pleading stage. *See, e.g., In re LeapFrog Enters., Inc. Sec. Litig.*, 527  
11    F. Supp. 2d 1033, 1050 (N.D. Cal. 2007) (“[w]e are pleased with our progress,”  
12    “we feel very positive,” and “[w]e are also strengthening our operations group”  
13    were actionable puffery).

14    Other alleged misrepresentations include generic descriptions of Fisker’s  
15    business model and asset-light strategy:

- 16     • “[O]ur business model has now been proven,” AC ¶ 111  
17         (Statement 1);  
18     • “This guidance balances our asset-light model,” *id.* ¶ 114  
19         (Statement 4);  
20     • “So again, from our perspective, we have an asset-light strategy,”  
21         *id.* ¶ 116 (Statement 5); and  
22     • “The positive adjusted gross margin demonstrates the benefit of  
23         our unique vehicle capabilities within the company,” *id.* ¶ 124  
24         (Statement 11).

25    These types of “vague,” “generalized,” and “unspecific” expressions are  
26    inactionable. *See In re Cisco Sys., Inc. Sec. Litig.*, 2013 WL 1402788, at \*13 (N.D.  
27    Cal. Mar. 29, 2013) (references to “compelling financial model” inactionable  
28    puffery). *Vignola v. FAT Brands*, 2019 WL 6138473, at \*12 (C.D. Cal. June 14,  
29    2019), is instructive. There, the court dismissed a claim premised on statements  
30    about the company’s “asset-light franchisor model,” holding that the “[s]tatements

1 about the advantages of the Company’s business model,” including that it “provides  
2 the opportunity for strong profit margins,” are “not much different than optimistic,  
3 aspirational predictions about the Company’s business.” *Id.*

4 Defendants’ statements comparing Fisker to its competitors and others in the  
5 market are also the type of generic expressions of optimism that have been held  
6 actionable. These statements include:

- 7
- 8 • “[W]e have an asset-light strategy, a very different business model  
to other start-ups or legacy OEMs,” AC ¶ 116 (Statement 5); and
  - 9 • “[N]ormally in an EV start-up, you are running obviously  
companies running 2 or 3 years with massive losses. . . . **So we are**  
10 **not in that position,**” *id.* ¶ 118 (Statement 6).

11 *See In re Wet Seal, Inc. Sec. Litig.*, 518 F. Supp. 2d 1148, 1168 (C.D. Cal. 2007)  
12 (“we’re the leader in a rapidly growing market” was actionable puffery).

13 Finally, insofar as the alleged misrepresentations include Defendants’  
14 categorization of issues as “straightforward” or “complex,” those statements are not  
15 capable of objective verification and thus are actionable. These statements  
16 include:

- 17
- 18 • “So from a program lifetime, we have a 50,000 annual volume.  
And those volumes are fairly straightforward,” AC ¶ 116  
(Statement 5); and
  - 19 • “Some other areas that were extremely complex . . .” and  
“extremely complex as you look at IT integrations,” *id.* ¶ 126  
21 (Statement 12).

22 *Cf. Wet Seal*, 518 F. Supp. 2d at 1168 (“we have an extremely broad product line”  
23 actionable puffery).

24 **6. Statements 3–6: Expressions of Opinion and Belief**

25 The AC further challenges a number of statements of opinion and belief,  
26 including:

- 27
- 28 • “I don’t know of any EV start-up that ever made a double-digit  
profit margin on the very first cars that we have delivered,” AC

- ¶ 113 (Statement 3);
- “I think that really sets the stage for where we’re going in the future,” *id.*;
  - “This guidance balances our asset-light model,” *id.* ¶ 114 (Statement 4);
  - “I expect those trends to continue to further go down,” *id.* ¶ 116 (Statement 5);
  - “I think number three, what’s really critical is to look at volumes in terms of the program lifetime,” *id.*;
  - “From our perspective, we have an asset-light strategy,” *id.*; and
  - “I’m also really excited about our positive gross margins,” *id.* ¶ 118 (Statement 6).

For these statements to be actionable, Plaintiff must allege specific facts establishing “both that ‘the speaker did not hold the belief she professed’ and that the belief is objectively untrue.” *City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605, 615–17 (9th Cir. 2017). Further, “when a plaintiff relies on a theory of omission, the plaintiff must allege ‘facts going to the basis for the issuer’s opinion . . . whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context.’” *Id.* at 616.

The AC, however, does not allege any facts to show what Defendants knew as of August 4, 2023, and thus fails to show what subjective “belief” Defendants held at the time any of these statements were made. Nor does the AC allege that any of the statements were “objectively untrue.” For instance, it does not allege facts to show that “I think . . . [it’s] critical [] to look at volumes in terms of the program lifetime” or Fisker “thought about selling a \$37,000 car, not [a] \$100,000 car” (AC ¶ 116) were false at the time they were made. Finally, the AC does not allege any particularized contemporaneous facts “going to the basis for” Defendants’ opinions whose omission rendered any of these statements misleading.

1           **7. Statement 12: Statement Regarding a “Highly Complex”**  
2           **Q3**

3           Plaintiff alleges Statement 12 (AC ¶ 126) was misleading because Dr. Gupta-  
4 Fisker said that Q3 was a “highly complex quarter” while allegedly failing to  
5 disclose that “many of the [later-disclosed] accounting errors were not complex.”  
6 But Dr. Gupta-Fisker was not talking about “accounting errors” in the cited  
7 statement. AC ¶ 127; *see also* Ex. 5 at 68. Instead, she was responding to an  
8 analyst who asked her “to talk about the delay in the 10-Q” and “given the  
9 personnel changes, how long before [the material weakness would be] rectified as  
10 well.” Ex. 5 at 67. Dr. Gupta-Fisker’s response discussed Fisker’s revenue  
11 increase, foreign exchange, convertible notes and derivatives, and “a lot of  
12 complexity in the business.” *Id.* at 68. Neither the alleged misstatement nor the  
13 question preceding it says or implies anything about accounting “errors,” let alone  
14 anything about the level of complexity of any accounting errors, and thus cannot be  
15 said to be misleading or inconsistent with the information Plaintiff alleges was  
16 omitted. *Kairalla v. Advanced Med. Optics, Inc.*, 2008 WL 2879087, at \*3 (C.D.  
17 Cal. June 6, 2008) (“Statements are not misleading where they are ‘not []  
18 inconsistent with the underlying true facts.’”).

19           **B. The AC Does Not Allege A Strong Inference Of Scienter.**

20           Plaintiff’s claims should be dismissed for the independent reason that the AC  
21 does not adequately allege a “strong inference” of scienter, *i.e.*, a defendant’s  
22 intention “to deceive, manipulate, or defraud.” *Tellabs*, 551 U.S. at 313. An  
23 inference of scienter must be both “cogent” and “at least as compelling as any  
24 opposing inference one could draw from the facts alleged.” *Id.* at 324. This  
25 “inquiry is inherently comparative” and requires the Court to “take into account  
26 plausible opposing inferences.” *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d  
27 981, 991 (9th Cir. 2009). Plaintiff’s burden to establish a strong inference of  
28 scienter “is not an easy standard to comply with.” *Eminence Cap., LLC v. Aspeon*,

1      *Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003); *see also Nguyen v. Endologix, Inc.*, 962  
2      F.3d 405, 414 (9th Cir. 2020) (the “strong inference” requirement “is an ‘exacting’  
3      pleading obligation” that “has teeth”).

4            **1. Defendants Had No Motive To Commit Fraud.**

5      Plaintiff has not articulated a plausible motive for the purported fraud.  
6      Instead, he asks this Court “to check [its] disbelief at the door,” *Nguyen*, 962 F.3d  
7      at 415, and find that Defendants intentionally misled investors about Fisker’s  
8      anticipated gross margin in August only to disclose “the truth” three months later,  
9      without anyone attempting to capitalize on that supposed knowledge.

10     Notably, Plaintiff does not allege that either Defendant tried to profit from  
11    the purported scheme by selling stock during the putative class period. *See, e.g., id.*  
12    (“If defendants had sought to profit from this scheme in the interim, such as by  
13    selling off their stock . . . the theory might have more legs.”). The absence of  
14    insider stock sales during the class period is powerful evidence of a lack of scienter.  
15    *See, e.g., Webb v. Solarcity Corp.*, 884 F.3d 844, 856 (9th Cir. 2018) (“[A] lack of  
16    stock sales can detract from a scienter finding.”); *Rigel Pharms.*, 697 F.3d at 884–  
17    85 (that “none of the defendants sold stock during the [class] period” undermines  
18    “an inference of scienter”).<sup>5</sup>

19     Plaintiff’s only allegation concerning a supposed motive to defraud is that  
20    Defendants “were motivated to raise \$450 million in desperately needed capital”  
21    through two “convertible note” loan transactions. *See AC ¶¶ 149–50.* But this is  
22    misleading. The more significant note transaction, which Plaintiff claims raised  
23    \$300 million, “closed on July 11, 2023,” *i.e.*, almost a month before the putative  
24    class period began, AC ¶ 151, and thus it could not possibly have provided  
25   

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26   <sup>5</sup> In *Nguyen*, the Court asked why the defendants would “promise the market that  
27    the FDA would approve Nellix if defendants knew the FDA would eventually  
28    figure out that Nellix could not be approved,” concluding that the “theory does not  
      make a whole lot of sense,” particularly where the defendants did not sell their  
      stock during the class period. 962 F.3d at 415.

1 motivation for alleged misstatements in August and November.<sup>6</sup> In any event, the  
2 Ninth Circuit has repeatedly declined to find that “attempts at securing capital . . .  
3 support an inference of scienter.” *Anderson v. Peregrine Pharms., Inc.*, 654 F.  
4 App’x 281, 281 (9th Cir. 2016); *see also Rigel Pharms.*, 697 F.3d at 884 (alleged  
5 motivation to obtain financing is insufficient because “to hold otherwise would  
6 support a finding of scienter for any company that seeks to enhance its business  
7 prospects”); *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1038 (9th Cir. 2002)  
8 (“[Defendant’s] alleged desires to obtain favorable financing . . . cannot normally  
9 be alleged to be motivations for fraud.”).<sup>7</sup>

10           **2. Plaintiff Does Not Adequately Allege Intent Or Deliberate**  
11           **Recklessness.**

12           Lacking a plausible theory of motive, Plaintiff points to a broad assortment  
13 of “scienter allegations,” the rhetorical equivalent of “throwing everything at the  
14 wall to see what sticks.” Nothing does. To plead a “strong inference of scienter,” a  
15

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16           <sup>6</sup> The second note transaction, which Plaintiff claims resulted in \$150 million in  
17 proceeds, closed “on September 29, 2023,” *see* AC ¶ 152, and thus, even accepting  
18 Plaintiff’s narrative, Defendants had no motivation to make false or misleading  
statements in November 2023.

19           <sup>7</sup> This Court has held that the “desire to raise company financing, combined with  
20 the ‘red flags’ of a company’s financial condition,” can be sufficient to plead  
21 scienter. *Butala v. Owlet, Inc.*, 2024 WL 3648141, at \*6 (C.D. Cal. Aug. 5, 2024).  
22 Here, however, Plaintiff does not allege that there were any known financial “red  
23 flags” when the convertible note transactions were negotiated. At best, Plaintiff  
24 points to a declaration filed in an unrelated proceeding by Fisker’s chief  
25 restructuring officer (who did not join the Company until April 25, 2024) and  
26 claims it establishes that Defendants “knew” by August 2023 that the Company  
27 “was facing potential financial distress.” AC ¶ 150. As an initial matter, this vague  
28 allusion to the “potential” of unspecified future financial issues is not a  
particularized allegation of a financial “red flag.” Even more importantly, third  
party statements cannot support a strong inference of scienter if the speaker “lack[s]  
first hand knowledge regarding what the individual defendants knew or did not  
know.” *Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.*, 759 F.3d 1051, 1063  
(9th Cir. 2014). In any event, Plaintiff misleadingly omits the fact that the  
declaration was amended to correct inaccuracies, including by removing the  
reference upon which Plaintiff purports to rely. *See* Ex. 8.

1 plaintiff must show that the defendant “made false or misleading statements either  
2 intentionally or with deliberate recklessness,” the latter of which is “a form of  
3 intentional or knowing misconduct” wherein the “danger of misleading [investors]  
4 is either known . . . or is so obvious that [defendant] must have been aware of it.”  
5 *Zucco*, 552 F.3d at 991. Plaintiff’s scattershot allegations do not come close to  
6 meeting this standard.

7                   **a. Defendants’ status as executives and/or shareholders.**

8 Plaintiff first attempts to establish that Defendants *must have known* the truth  
9 about Fisker’s gross margin because they were “senior executives” with a “hands  
10 on” approach to operations. AC ¶¶ 132–35, 138–44, 169. For example, Plaintiff  
11 observes that Defendants were responsible for the content of SEC filings and public  
12 statements, spoke on the Company’s behalf, and were a “vital part” of the  
13 Company’s operations. *Id.* ¶¶ 130, 134–35. However, an executive’s “awareness  
14 of the day-to-day workings of the company’s business does not establish  
15 scienter . . . absent some additional allegation of specific information conveyed to  
16 management and related to the fraud.” *Metzler Inv. GMBH v. Corinthian Colls., Inc.*,  
17 540 F.3d 1049, 1068 (9th Cir. 2008). A plaintiff “must do more than allege  
18 that . . . key officers had the requisite knowledge by virtue of their ‘hands on’  
19 positions”—a standard that “would eliminate the necessity for specially pleading  
20 scienter, as any corporate officer could be said to possess the requisite knowledge  
21 by virtue of his or her position.” *In re U.S. Aggregates, Inc. Sec. Litig.*, 235 F.  
22 Supp. 2d 1063, 1074 (N.D. Cal. 2002).

23 Next, Plaintiff alleges that Defendants “possess[ed]” or “had access to”  
24 information about the Company’s financial condition through corporate reports,  
25 documents, and meetings. AC ¶ 136. The AC, however, does not identify or  
26 describe the contents of any specific report, document, or meeting, let alone allege  
27 that something therein contradicted any of Defendants’ statements. *See, e.g.,*  
28 *Intuitive Surgical*, 759 F.3d at 1063 (“Missing are allegations linking specific

1 reports and their contents to the executives[.]”). A defendant’s “[m]ere access to  
2 reports containing undisclosed [information] is insufficient to establish a strong  
3 inference of scienter.” *Id.* (citing *Zucco*, 552 F.3d at 1001).

4 Plaintiff also claims that the Company was “tightly controlled” by  
5 Defendants, who held “greater than 90% of the voting power of Fisker’s capital  
6 stock.” AC ¶ 129. But even were this true, Defendants’ voting control over the  
7 Company is not probative of scienter because it does not suggest that they  
8 possessed information contradicting the Company’s disclosures. *See, e.g., In re*  
9 *Aegean Marine Petroleum Network, Inc. Sec. Litig.*, 529 F. Supp. 3d 111, 171  
10 (S.D.N.Y. 2021) (allegations that defendants collectively “owned sufficient shares  
11 to influence control over [the company]” insufficient to plead scienter).

12                   **b. Anonymous former employee statements.**

13                  The AC references supposed accounts from two anonymous “former  
14 employees” of Fisker (“FE1” and “FE2”) in an effort to “corroborate a strong  
15 inference of scienter.” *See* AC ¶¶ 160–69. However, Plaintiff’s own allegations  
16 demonstrate that both “witnesses lack[ed] first hand knowledge regarding what the  
17 individual defendants knew or did not know about [the Company’s] financial  
18 health” during the class period—and thus are insufficient to support a strong  
19 inference of scienter. *Intuitive Surgical*, 759 F.3d 1051 at 1063.

20                  With respect to FE1, the AC cites only one vague statement about either of  
21 the Defendants: that “generally, many at Fisker, including Gupta-Fisker, would  
22 provide feedback” on financial statements. AC ¶ 164. This bland observation—  
23 which could be made about virtually every CFO in America—is irrelevant to the  
24 scienter inquiry. *See, e.g., In re Nvidia Corp. Sec. Litig.*, 2010 WL 4117561, at \*6  
25 (N.D. Cal. Oct. 19, 2010) (“[B]road statements [about] a general practice” do not  
26 “provide[] any particularized details about” the alleged misstatements).<sup>8</sup> FE2’s

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27  
28                  <sup>8</sup> FE1’s other purported statements consisted of rank speculation about the reasons  
for Beuting’s resignation (“Beuting *may have been* uncomfortable with what was

1 primary accusation is that in “1Q24,” Defendants were “rushing” a model for a  
2 partnership between the Company and Nissan before there was “time to vet the  
3 numbers.” AC ¶ 168. Not only does FE2’s critique come well after the relevant  
4 period, but it has *nothing* to do with Plaintiff’s allegations here. Additionally,  
5 Plaintiff does not allege that FE2 raised his concerns about “rushing” the  
6 partnership model with Defendants or that Defendants shared his concerns. *Id.* In  
7 sum, none of the former employee statements remotely suggests that Defendants  
8 had information inconsistent with their challenged statements. *See, e.g.,*  
9 *McCasland v. FormFactor Inc.*, 2009 WL 2086168, at \*5 (N.D. Cal. July 14, 2009)  
10 (confidential witness allegations inadequate because they did not “allege that any  
11 CW heard or read any specific private statement by a defendant that contradicted a  
12 public statement”).

13 Plaintiff also cites the anonymously sourced July 9, 2024 Car Buzz article,  
14 which reported a challenging work environment at Fisker, with unnamed sources  
15 complaining that Defendants had questionable judgment, their actions “didn’t make  
16 sense,” and employees felt that they “couldn’t speak up.” AC ¶¶ 147–48. The Car  
17 Buzz article, however, does not provide any details from which to infer that its  
18 unnamed sources offered “reliable personal knowledge concerning the  
19 [Defendants’] mental state.” *Perrin v. Sw. Water Co.*, 2011 WL 10756419, at \*12  
20 (C.D. Cal. June 30, 2011); *see also Wet Seal*, 518 F. Supp. 2d at 1172 (allegations  
21 based on anonymously sourced news reports “do Plaintiffs little good because they  
22 provide no specific facts to corroborate the reliability of the report”). In any event,  
23 the grievances relayed in the article concern Defendants’ temperament, competence  
24 and operational decision-making—i.e., they do not concern what Defendants knew

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25  
26 going on”), PwC’s feelings concerning Fisker’s financial statements (“PwC *may*  
27 *have been* uncomfortable with how Fisker was reporting its COGS”), and the  
28 Company’s rollout of SAP (“the implementation of SAP *may have been rushed*”).  
AC ¶¶ 160–63, 165 (emphasis added). None of this speculation, however, is related  
to Defendants or offers any insight into what they knew or did not know.

1 and when, let alone what Defendants knew about the facts relevant to Plaintiff's  
2 misstatement claims.

3                   **c. Employee and auditor resignations.**

4 Plaintiff next argues that the "resignations of multiple Fisker executives,"  
5 including John Finnucan, Florus Beuting, and Burkhard Huhnke, support an  
6 inference of scienter. AC ¶ 156. But it is well-established that a plaintiff must  
7 "differentiate between a suspicious change in personnel and a benign one." *Zucco*,  
8 552 F.3d at 1002. Conclusory allegations that an employee "resigns or retires  
9 during the class period . . . cannot support a strong inference of scienter." *Id.*  
10 Rather, an employee's resignation is relevant only when "'the resignation at issue  
11 was uncharacteristic . . . or was accompanied by suspicious circumstances.'" *City*  
12 *of Dearborn Heights*, 856 F.3d at 622 (quoting *Zucco*, 552 F.3d at 1002).

13         Here, the only allegations about Mr. Finnucan's resignation as CAO state his  
14 notice and effective dates, that he was one of Fisker's "highest paid employee[s],"  
15 and that the Company later announced a delay in filing its financial statements due  
16 to his resignation. *Id.* at ¶¶ 156–57. None of this suggests that Finnucan's  
17 departure was "uncharacteristic" or "suspicious." Indeed, the Company's 8-K  
18 disclosed that Finnucan left Fisker to pursue another opportunity as "the chief  
19 financial officer of a private company," *see* Ex. 3 at 39, and thus the overriding  
20 inference is that this was merely "a benign" change in personnel. *Zucco*, 552 F.3d  
21 at 1002.

22         With respect to Mr. Beuting, Plaintiff points out that he served as CAO for  
23 only eight days, November 6, 2023 through November 14, 2023. AC ¶ 157. But  
24 the AC offers no other detail concerning Beuting's resignation and certainly does  
25 not connect his relatively brief tenure to any purported wrongdoing or fraudulent  
26 activity. *See, e.g., Zucco*, 552 F.3d at 1002 (inference of fraud not as compelling as  
27 inference that departures were due to "unrelated personal or business reasons").  
28 Insofar as Plaintiff is pointing to the fact that Beuting resigned a day after Fisker

1 announced its quarterly financial results, courts have routinely found allegations  
2 regarding the *timing* of an employee's departure deficient. *See, e.g., City of*  
3 *Dearborn Heights*, 856 F.3d at 622 (“[M]ere conclusory allegation that a financial  
4 manager resigns or retires . . . shortly before the corporation issues its restatement, .  
5 . . without more, cannot support a strong inference of scienter.” (cleaned up)).<sup>9</sup>

6 Plaintiff further alleges that in May 2024, well after the class period ended,  
7 Fisker disclosed that PwC would not stand for reappointment for the fiscal year  
8 ending December 31, 2024. AC ¶ 170; Ex. 7. But the AC provides no detail  
9 concerning PwC’s decision-making. *See, e.g., In re Maxwell Techs., Inc. Sec.*  
10 *Litig.*, 18 F. Supp. 3d 1023, 1040 (S.D. Cal. 2014) (“Without additional explanation  
11 about the reasons for [independent auditor’s] resigning . . . , the resignation alone  
12 does not indicate that the individual defendants had scienter.”).

13                   **d. Unrelated accounting discrepancies.**

14 Plaintiff points to a handful of “accounting discrepancies” in Fisker’s  
15 financials and claims they suggest “deliberate recklessness or intentional  
16 manipulation.” AC ¶ 159. Most of these supposed discrepancies are minor, e.g., an  
17 alleged \$3,000 difference between a press release and financial statement related to  
18 \$763,000 worth of expenses. *Id.* And it is not clear how these alleged accounting  
19 errors are related in any way to the substantive fraud claims in this case. In any  
20 event, “the mere publication of inaccurate accounting figures . . . without more,  
21 does not establish scienter.” *DSAM Glob. Value Fund v. Altris Software, Inc.*, 288  
22 F.3d 385, 390 (9th Cir. 2002).

23

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24                   <sup>9</sup> For the same reasons, Plaintiff’s allegations that Dr. Burkhard Huhnke “abruptly”  
25 resigned “just nine days before Fisker announced a delay in completion” of the  
26 Company’s financials (AC ¶ 158) are insufficient, particularly given the lack of any  
27 allegations connecting Huhnke to the facts relevant to Plaintiff’s misstatement  
28 claims. *See, e.g., Ryan v. FIGS, Inc.*, 2024 WL 187001, at \*12 (C.D. Cal. Jan. 17,  
2024) (finding a CFO’s “unexpected” departure insufficient to establish scienter  
and declining “to speculate as to the reasons behind a change of leadership  
positions”).

Further, the AC does not suggest that either Defendant was involved in making the alleged errors, much less that they “knowingly and recklessly engaged in an improper accounting practice.” *See Metzler*, 540 F.3d at 1068–69; *see also In re ICN Pharms., Inc., Sec. Litig.*, 299 F. Supp. 2d 1055, 1065 (C.D. Cal. 2004) (dismissing action where plaintiffs failed to “provide detailed evidence of the contemporaneous decision-making behind the alleged accounting errors that would combine to show the required scienter”).

e. Sarbanes-Oxley certifications.

9 Plaintiff claims that Defendants' signatures on the Company's Sarbanes-  
10 Oxley mandated certifications support an inference of scienter. AC ¶¶ 173–75. But  
11 these "required certifications," which are made by every public company CEO and  
12 CFO in quarterly and annual reports, "add nothing substantial to the scienter  
13 calculus." *Zucco*, 552 F.3d at 1003–04. "[A]llowing Sarbanes–Oxley certifications  
14 to create an inference of scienter in 'every case where there was an accounting error  
15 or auditing mistake made by a publicly traded company' would 'eviscerat[e] the  
16 pleading requirements for scienter set forth in the PSLRA.'" *Id.*

**f. Unrelated arbitration decision and investigation.**

Plaintiff alleges that Dr. Gupta-Fisker has “been found to lack credibility” by an arbitrator in an unrelated arbitration matter involving a former employee who claimed he was owed “founder’s stock” in Fisker. AC ¶¶ 145–46. Even if Plaintiff’s selective characterization of the arbitrator’s decision was accurate (and it decidedly is not), the arbitrator’s commentary would not be probative of scienter here. “[E]ven if a finding of wrongfulness [from another action] was alleged,” a court could not “conclude that those allegations are therefore relevant to claims of reckless conduct in the instant case.” *Fidel v. Rampell*, 2005 WL 5587454, at \*7 (S.D. Fla. Mar. 29, 2005); *see also Knox v. Yingli Green Energy Holding Co. Ltd.*, 242 F. Supp. 3d 950, 973 (C.D. Cal. 2017) (“[A] stray allegation of wrongdoing . . . does not help establish scienter.”).

1 Plaintiff also references reports that Fisker “received a subpoena from the  
2 Securities and Exchange Commission, indicating the [Company] could be under  
3 investigation by [the SEC].” AC ¶ 172. Allegations of the mere existence of SEC  
4 subpoenas or investigations are entirely insufficient to support an inference of  
5 scienter. *See, e.g., In re Hansen Nat. Corp. Sec. Litig.*, 527 F. Supp. 2d 1142, 1162  
6 (C.D. Cal. 2007) (“[T]he mere existence of [an] investigation cannot support any  
7 inferences of wrongdoing or fraudulent scienter on the part of [a] company or its  
8 senior management.”); *see also In re Solarcity Corp. Sec. Litig.*, 274 F. Supp. 3d  
9 972, 1011 n.8 (N.D. Cal. 2017) (“vague allegations” about an SEC investigation  
10 “are insufficient to establish scienter”).

11       **3.     The Nonfraudulent Inference Concerning Fisker’s Inventory**  
12       **Adjustment Is More Compelling.**

13       When evaluating scienter, the Court must “compare the plausibility of its  
14 holistic review to alternative, non-culpable explanations.” *In re Alteryx, Inc. Sec.*  
15 *Litig.*, 2021 WL 4551201, at \*8 (C.D. Cal. June 17, 2021). As noted above,  
16 Plaintiff’s motiveless, profitless theory of fraud makes no sense. However, there is  
17 a far more compelling, nonfraudulent explanation for Fisker’s Q3 gross margin  
18 announcement and the adjustment of expenses from SG&A to COGS. To wit,  
19 although the accounting rules relevant to start-ups and auto manufacturers are  
20 complex, Fisker’s forecasts and accounting determinations were made in good  
21 faith. However, in preparing its third quarter financial disclosures, the Company’s  
22 accounting team (in consultation with its outside auditor) determined that certain  
23 adjustments needed to be made. The Company promptly disclosed the relevant  
24 adjustments and explained the impact on Fisker’s financials. This suggests  
25 transparency, not an intent to mislead.

26       **C.     The AC Fails to Plead Loss Causation.**

27       Plaintiff must also adequately allege that Defendants “caused the loss for  
28 which [he] seeks to recover damages.” 15 U.S.C. § 78u-4(b)(4). To do so, Plaintiff

1 must allege with particularity that “after purchasing h[is] shares and before  
2 selling[,] . . . (1) ‘the truth became known,’ and (2) the revelation caused the fraud-  
3 induced inflation in the stock’s price to be reduced or eliminated.” *In re BofI*  
4 *Holding, Inc. Sec. Litig.*, 977 F.3d 781, 789 (9th Cir. 2020). The most common  
5 way to prove that the “truth became known” is to “identify one or more corrective  
6 disclosures” that “reveal[] new facts that . . . render some aspect of the defendant’s  
7 prior statements false or misleading.” *Id.* at 790; *see also In re Nuveen Funds/City*  
8 *of Alameda Sec. Litig.*, 2011 WL 1842819, at \*10 (N.D. Cal. May 16, 2011)  
9 (corrective disclosure must “relate back to the misrepresentation and not to some  
10 other negative information”).

11 Plaintiff alleges that Fisker’s stock price fell when “the truth” about  
12 Defendants’ purported material misrepresentations “was partially revealed” in a  
13 series of disclosures made on November 8, 2023; November 13, 2023; and  
14 November 20, 2023. AC ¶ 178. But these disclosures are not corrective  
15 disclosures because (1) they do not “relate back” to the alleged misrepresentations,  
16 and/or (2) they did not “become known” before Plaintiff sold his stock on  
17 November 10, 2023.

18 **1. November 8, 2023 Announcement**

19 The first alleged partial corrective disclosure is Fisker’s November 8 press  
20 release announcing that “the completion of [its quarterly] financial statements  
21 would be delayed due to the appointment of a new chief accounting officer . . . and  
22 the departure of [its] former CAO.” AC ¶ 179. That Fisker was delaying the  
23 issuance of its Q3 financial results and the filing of related financial disclosures was  
24 the **only** “new” fact revealed to the market in this very short press release,<sup>10</sup> and  
25 thus there was nothing that could have “render[ed] some aspect” of Fisker’s prior  
26 statements about its gross margin “false or misleading.” *BofI Holding*, 977 F.3d at

27  
28 <sup>10</sup> Fisker had previously announced on September 22, 2023 that the former CAO,  
John Finnucan, had given notice of his intent to resign. AC ¶ 64.

1 790; *see also Brown v. Ambow Educ. Holding Ltd.*, 2014 WL 523166, at \*7 (C.D.  
2 Cal. Feb. 6, 2014) (announcement of delayed SEC filing was not a partial  
3 “corrective disclosure” because it did not “reveal[] to the market any  
4 misrepresentations” concerning the “categories of alleged misstatements that  
5 Plaintiffs rel[ied] on”); *In re Buca Inc. Sec. Litig.*, 2006 WL 3030886, at \*9 (D.  
6 Minn. Oct. 16, 2006) (news of delayed 10-K filing not corrective disclosure  
7 because it “did not disclose the alleged fraud”). Accordingly, the November 8  
8 announcement does not constitute a corrective disclosure, nor can it be a “partial  
9 corrective disclosure” for the reasons detailed below.<sup>11</sup>

10 **2. November 13, 2023 Earnings Release**

11 Plaintiff asserts that the Company’s November 13, 2023 earnings release was  
12 the next “partial disclosure,” wherein “Fisker reported a gross margin of -17%” and  
13 “further delayed the filing of its 3Q23 10-Q.” AC ¶ 180. No matter whether the  
14 November 13 announcement relates back to Fisker’s prior statements concerning  
15 gross margin, it is, in any event, irrelevant to the loss causation inquiry because  
16 ***Plaintiff sold all of his Fisker stock three days earlier*** and therefore cannot  
17 establish any losses attributable to the November 13 release. *See, e.g., Mehedi v.*  
18 *View, Inc.*, 2024 WL 3236706, at \*9 (N.D. Cal. June 28, 2024) (where plaintiff  
19 “sold its shares before the truth was revealed,” it could “not attribute its losses” to  
20 the later “corrective disclosure”); *see also MacPhee v. MiMedx Grp., Inc.*, 73 F.4th  
21 1220, 1248 (11th Cir. 2023) (announcements did not qualify as “series of partial  
22 corrective disclosures” because lead plaintiff sold shares before relevant truth  
23 revealed).

24 \_\_\_\_\_  
25 <sup>11</sup> Defendants acknowledge that in its decision appointing Plaintiff as the lead  
plaintiff, this Court observed that the November 8 disclosure could be “a partial  
26 corrective disclosure” in light of “the successive revelations on November 13 and  
20.” *See* ECF No. 56 at 7–8. As set out below, those “successive revelations”  
27 occurred **after** Plaintiff sold all of his Fisker shares, and thus they do not constitute  
28 “corrective disclosures” to which his alleged losses can be attributed. *See infra* §  
IV.C.2.

1       *Mehedi* is instructive. There, the court rejected the plaintiff’s argument that  
2 it had sufficiently alleged loss causation when it sold its shares before the revelation  
3 of the fraud but after an earlier “partial corrective disclosure” concerning a  
4 government investigation. 2024 WL 3236706, at \*8–9. The plaintiff relied on the  
5 Ninth Circuit’s decision in *Loos v. Immersion* to argue that the announcement of an  
6 investigation could constitute a “partial corrective disclosure”—even if it did not  
7 itself reveal a fraud—if the fraud was later disclosed. *Id.* at \*8 (citing 762 F.3d 880  
8 (9th Cir. 2014)). But *Mehedi* distinguished *Loos* on the ground that the *Mehedi*  
9 plaintiff sold its stock before “the relevant truth was revealed,” and thus failed to  
10 allege loss causation. *Id.* at \*9. Like the plaintiff in *Mehedi*, Plaintiff here  
11 concedes that he sold his shares before the November 13 announcement that  
12 purportedly revealed the alleged fraud when considered together with Fisker’s  
13 earlier November 8 disclosure. Accordingly, Plaintiff “cannot attribute [his] losses  
14 to the [later] announcement—and thus fails to allege loss causation” in connection  
15 with either disclosure. *Id.*

16                   **3. November 20, 2023 Form 8-K**

17       Plaintiff’s last purported partial corrective disclosure, a one-sentence 8-K  
18 dated November 20, 2023 disclosing that Fisker’s new CAO, Florus Beuting, had  
19 resigned, *see* AC ¶ 181, suffers from the same flaws. First, Plaintiff sold all his  
20 shares before the announcement and thus cannot attribute any of his losses to it.  
21 *See supra* § IV.C.2. Second, even if Plaintiff had not previously sold his shares, the  
22 Company’s succinct disclosure concerning Mr. Beuting’s resignation did not  
23 “reveal new facts” about Fisker’s gross margin or its alleged accounting  
24 irregularities such that it could render Fisker’s prior statements misleading. *See*  
25 *Police & Fire Ret. Sys. of City of Detroit v. SafeNet, Inc.*, 645 F. Supp. 2d 210, 229  
26 (S.D.N.Y. 2009) (“Standing alone, the announcement of the departure of an officer,  
27 without explanation, would not alert investors to any improprieties so as to allege  
28 loss causation.”).

Tellingly, the AC acknowledges that the accounting misclassifications and material weaknesses relating to inventory and related income statement accounts—key to the purported “relevant truth”—were not “revealed” to the market until ***the November 22, 2023 filing*** of the third quarter Form 10-Q. AC ¶¶ 17–18, 79. While such a disclosure might otherwise—under Plaintiff’s theory of the case—constitute the ultimate “corrective disclosure,” Plaintiff does not and cannot allege it as such because Fisker’s stock price actually ***went up*** following that filing. Ex. 9; see *In re Facebook, Inc. Sec. Litig.*, 87 F.4th 934, 953 (9th Cir. 2023) (“[p]leading loss causation requires a showing that the ‘share price fell significantly after the truth became known’”); *Daniels Fam. 2001 Revocable Tr. v. Las Vegas Sands Corp.*, 709 F. Supp. 3d 1217, 1237 (D. Nev. 2024) (loss causation allegations “unavailing” because “complaint does not allege a drop in stock price during [certain corrective disclosure] dates, let alone a significant drop”).

**D. The AC Fails to State a Claim for Control Person Liability Under Section 20(a).**

Plaintiff's Section 20(a) claims should be dismissed because they fail "to adequately plead a primary violation of section 10(b)." *Zucco*, 552 F.3d at 990.

18 | V. CONCLUSION

19 || For these reasons, the AC should be dismissed.

21 Dated: December 6, 2024 ORRICK, HERRINGTON & SUTCLIFFE LLP

*/s/ Kevin M. Askew*  
KEVIN M. ASKEW  
Attorneys for Defendants

## CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief contains 8,945 words, which complies with the word limit set by court order dated November 14, 2024 (ECF No. 61).

Dated: December 6, 2024 ORRICK, HERRINGTON & SUTCLIFFE LLP

*/s/ Kevin M. Askew*  
KEVIN M. ASKEW  
Attorneys for Defendants

## APPENDIX A

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### CHALLENGED STATEMENTS CHART

*Douglas v. Fisker, et al.,*

No. 2:23-cv-09976-FLA (KSx) (C.D. Cal.)

#	Challenged Statement	Source
1	“We are currently in a quarter that truly marks the inflection for Fisker—our business model has now been proven, by the fact that we are already making a positive profit margin on the first vehicles we are selling[.]”	AC ¶ 111; Ex. 1 at 6 <sup>1</sup>
2	“Fisker anticipates an 8–12% gross margin range for full year 2023, provided input costs do not change dramatically.”	AC ¶ 112; Ex. 1 at 9
3	“And talking about profitability, I don’t know of any EV start-up that ever made a double-digit profit margin on the very first cars that we have delivered. And I think that really sets the stage for where we’re going in the future.”	AC ¶ 113; Ex. 2 at 19
4	“We still anticipate gross margins for the full year 2023 in the 8% to 12% range despite exceeding targets in Q2, provided input costs do not change dramatically .... this guidance balances our asset-light model[.]”	AC ¶ 114; Ex. 2 at 25
5	“But to answer your question on gross margins, the first critical topic is to design and engineer a vehicle where you have thought about gross margins. You have thought about material input, you have thought about the number of parts. So we—from the get-go created an organization that thought about selling a \$37,500 car, not \$100,000 car. So the entire organization thinks about a few parts. The entire organization thinks about the steel stamp body, how can, we engineer the car for more efficiency. So that’s the first topic. The second topic is that we’ve seen battery costs go down. So the input costs on batteries went down from Q1 from Q2 to Q3. So I expect those trends to	AC ¶ 116; Ex. 2 at 28

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<sup>1</sup> All “Ex.” references are to the exhibits attached to Defendants’ Request for Judicial Notice.

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*Douglas v. Fisker, et al.,*

No. 2:23-cv-09976-FLA (KSx) (C.D. Cal.)

#	Challenged Statement	Source
	continue to further go down. And I think number three, what's really critical is to look at volumes in terms of the program lifetime. So from a program lifetime, we have a 50,000 annual volume. And those volumes are fairly straightforward. We also, by the way, don't amortize our investments. I can't comment on what other start-ups do, but legacy—OEMs do amortize their investments. They also amortize their ED&D that they in-house spend, which we don't amortize, because we actually spend the money with our suppliers. So again, from our perspective, we have an asset-light strategy, a very different business model to other start-ups or legacy OEMs.”	
6	“I’m also really excited about our positive gross margins, quite frankly, because normally in an EV start-up, you are running obviously companies running 2 or 3 years with massive losses, which obviously means you need to raise a lot of money just to cover those losses. So we are not in that position.”	AC ¶ 118; Ex. 2 at 35
7	“Gross margin was -17% on a GAAP basis (adjusted gross margin was 9%)[.]”	AC ¶ 120; Ex. 4 at 43
8	“Gross margin was -17% on a GAAP basis; adjusted gross margin was 9%, which excludes an inventory valuation adjustment associated with lower levels of production during the ramp-up phase which we expect to continue until we reach full production.”	AC ¶ 121; Ex. 4 at 45
9	“Net loss totaled \$91.0 million[.]”	AC ¶ 122; Ex. 4 at 45
10	Reporting cost of goods sold was \$83.92 million, gross margin was -\$12.12 million, net loss before income taxes was \$89.123 million, and net loss was \$90.958 million.	AC ¶ 123; Ex. 4 at 48

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### CHALLENGED STATEMENTS CHART

*Douglas v. Fisker, et al.,*

No. 2:23-cv-09976-FLA (KSx) (C.D. Cal.)

#	Challenged Statement	Source
11	<p>“Our third quarter cost of goods sold totaled \$83.9 million, which included \$18.2 million of noncash inventory adjustment impact associated with initial production ramp. As our production ramp continues, we expect inventory adjustments to diminish. In the quarter, GAAP gross margin was negative 17% and non-GAAP gross margin was 9%, which excludes the inventory adjustment. We have additional impacts from FX, geographic mix and higher input costs with a first-in first-out inventory treatment that collectively shaved another few points of the margin, which would have ended up in the mid-teens if they were added back. The positive adjusted gross margin demonstrates the benefit of our unique vehicle capabilities within the company and points towards a faster path towards positive EBITDA. Our Q3 operating expenses totaled \$87.4 million, which was down 38% year-over-year and down 1% over quarter as launch-related R&amp;D expenses continue to taper off while marketing sales and service investments increased. Loss from operations was \$99.6 million, a 29% year-over-year improvement and a 13% quarter-over-quarter increase. Net loss totaled \$91 million or \$0.27 loss per share compared to \$0.49 loss per share last year.”</p>	AC ¶ 124; Ex. 5 at 56
12	<p>“Q3 was a highly complex quarter. Went from \$800,000 of revenue to \$71 million of revenue. In multiple countries, ForEx, very complex accounting along with convertible notes and accounting for derivatives. So we experienced quite a lot of complexity in the business, and as you rightly pointed out, personnel changes as well. We, of course, continue to understand all these different areas. We are continuing to hire. We do have already 3 controllers in place, 2 in the U.S., 1 in Europe, and we continue to strengthen the team. We continue to add more experts</p>	AC ¶ 126; Ex. 5 at 68

## APPENDIX A

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### CHALLENGED STATEMENTS CHART

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#	Challenged Statement	Source
	within the team. Some other areas that were extremely complex were because of contract manufacturing, things like raw material inventory accounting and finished goods inventory accounting, things that we had not done before and extremely complex as you look at IT integrations with Magna, in-house integrations. So these are unfortunately growing pains and we are addressing all these different areas so we can also mature our systems, hire more people, hire more talent to address all these different areas, and it's a work in progress. We are working tirelessly, very hard to get the queue done, so more to come on that."	